STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN EUGENE RHEA,

Defendant-Appellant.

UNPUBLISHED
March 20, 2003

No. 235548
Macomb Circuit Court
LC No. 00-003516-FH

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); and felonious assault, MCL 750.82. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to twenty to forty years' imprisonment for the home invasion conviction. He also received a concurrent term of two to four years' imprisonment for the assault conviction. Defendant appeals as of right. We affirm.

I. Facts

This case arises out of a home invasion and assault that occurred in Eastpointe. Mr. David Fournier stated that he and his mother went out to dinner and returned to her home at approximately 8:00 p.m. Mr. Fournier testified that he dropped his mother off while he went to park the car. Upon entering the house, Mr. Fournier claimed that he heard his mother yell, "[w]hat are you doing in my house?" Mr. Fournier then noticed that the kitchen and dining room were ransacked. According to Mr. Fournier, his mother informed him that, "he went out the front door." Mr. Fournier then observed defendant running in front of the house toward the corner.

Mr. Fournier began to chase after defendant. However, Mr. Fournier stated that he hesitated when defendant made a slashing motion toward him with something that appeared to be a knife.[1] Mr. Fournier testified that defendant kept saying, "I didn't take anything." However, during the chase Mr. Fournier noticed defendant take a white bag out of his pocket and throw it

[1] Mr. Fournier testified that at some point during the chase he determined that the object was actually a screwdriver.

into a yard. He claimed that a bystander eventually helped him catch defendant. The two men then detained defendant until the police arrived. Mr. Fournier informed the police that defendant threw something into a yard, and the police recovered a bag of bullets from that location. At trial, Mr. Fournier testified that his father had owned a gun that used "those bullets." Mr. Fournier further claimed that after the incident he noticed an opened box of bullets in his mother's bedroom.

II. Sufficiency of the Evidence

Defendant, through his appellate counsel, challenges the sufficiency of the evidence in this case. Additionally, defendant filed a separate brief, *in propria persona*, challenging the trial court's decision to deny his motion for a directed verdict. In sufficiency of the evidence claims, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (sufficiency of the evidence); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999) (directed verdict).

A. Circumstantial Evidence

Defendant *in propria persona* challenges the trial court's decision to deny his motion for a directed verdict, indicating that he believes that the evidence against him was purely circumstantial. However, case law clearly states, "[c]ircumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Indeed, in some situations "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v Cleveland Tankers, Inc*, 364 US 325, 330; 81 S Ct 6; 5 L Ed 2d 20 (1960). Because there is no inherent distinction in the probative value of direct or circumstantial evidence, defendant has failed to establish any error.

B. Home Invasion

Appellate counsel contends that there was insufficient evidence to establish that the defendant either entered the house or that Mr. Fournier's mother was present in the house when defendant was inside. We disagree.

In this case there was sufficient evidence for a jury to conclude that defendant was guilty of home invasion. See MCL 750.110a(2). While there was no sign of forced entry, the record indicates that the front door to the dwelling was unlocked. Further, it is a reasonable inference that defendant was inside the house when complainant's mother yelled, "[w]hat are you doing *in* my house." (Emphasis added). Defendant was the only person seen running away from the home. Moreover, Mr. Fournier testified that he observed defendant discard a white bag while he was fleeing from the home. The record shows that the white bag contained bullets similar to the type of bullets kept in the house. This evidence was sufficient to prove that defendant was in the house while Mr. Fournier's mother was present. See *Jolly, supra*.

C. Assault

Appellate counsel next asserts that there was no evidence to establish that defendant brandished his screwdriver with a specific intent to harm Mr. Fournier or cause him to fear an immediate battery. We disagree.

Counsel does not dispute that a screwdriver can constitute a dangerous weapon for purposes of felonious assault. He also concedes that the jury believed the testimony indicating that defendant repeatedly "swung a screwdriver" at Mr. Fournier. However, counsel claims that the evidence did not suggest that those actions were intended to put Mr. Fournier in fear of an imminent battery. Rather, counsel opines that the record shows that defendant intended only to cause Mr. Fournier to abandon his pursuit.

Mr. Fournier's description of the slashing motions made by defendant while trying to evade capture, invites the obvious inference that defendant was attempting to put Mr. Fournier in fear of an immediate battery. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted). Thus, we find that a reasonable juror could conclude from this evidence that defendant committed a felonious assault. See *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

III. Appellate Counsel's Issues

Appellate counsel additionally argues that the trial court abused its discretion in imposing a minimum sentence within the range recommended by the sentencing guidelines.[2] He further asserts that the trial court erred in granting the prosecutor's motion to amend the information.

A. Proportionality

Appellate counsel concedes that defendant's minimum sentence for the first-degree home invasion conviction is within the range recommended by the guidelines. Moreover, he does not challenge the scoring of the guidelines. Rather, counsel asserts that the resulting minimum sentence in this case is invalid because it is disproportionate to the crime. We disagree.

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). Appellate counsel acknowledges this statutory command, but insists that it constitutes a violation of the separation of powers.[3]

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[2] The legislative sentencing guidelines apply in this case because the conduct for which defendant was convicted occurred after January 1, 1999. MCL 769.34(2).

[3] Const 1963, art 1, § 20; Const 1963, art 6, § 1.

However, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), citing Const 1963, art 4, § 45. Accordingly, for cases governed by the Legislature's sentencing guidelines, proportionality review is inappropriate except where the trial court has exercised its statutorily granted discretion to depart from the sentencing range recommended by the guidelines. *Hegwood, supra* at 437, n 10; *People v Babcock*, 250 Mich App 463, 468-469; 648 NW2d 221 (2002). For these reasons, we decline counsel's invitation to engage in a proportionality review of defendant's minimum sentence.

B. Amendment of the Information

Appellate counsel also asserts that the trial court improperly permitted the prosecution to amend the information. A trial court's decision to allow an amendment to the information is reviewed for an abuse of discretion. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998). A trial court may permit the prosecution to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Jones*, 252 Mich App 1, 4-5; 650 NW2d 717 (2002).

In this case, the trial court permitted the prosecution to correct the information by amending the date and location of the offense. It does not appear that defendant was prejudiced or unfairly surprised by the prosecution's amendments. Thus, we find no abuse of discretion.

III. Defendant's Issues

Defendant *in propria persona* raises several issues on appeal relating to the polling of the jury, sentencing, his status as a fourth habitual offender, and ineffective assistance of counsel.

A. Jury Poll

Defendant initially contends that the trial court erred when it failed to poll the jury separately on each count. Because defendant failed to object to the trial court's method of polling the jurors, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After the jury tendered its verdict finding defendant guilty as charged on both counts, the trial court ordered that the jurors be polled. Each juror assented to the verdict as read. There is no requirement that a jury be polled to return a valid verdict. Rather, polling is proper at the request of a party or upon the court's own motion. MCR 6.420(C). The single verdict in this case covered both of the jury's findings of guilt. Accordingly, find no plain error affecting defendant's substantial rights. *Carines, supra*.

B. Sentencing Issues

1. Antipathy Toward Defendant

Defendant challenges his sentence on the basis that the trial court improperly allowed its feelings toward defendant and defense counsel to influence the sentence it imposed.[4] We disagree.

A sentencing judge's personal feelings of antipathy toward a defendant should not be reflected in sentencing. See *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Rather, a criminal sentence should reflect the criteria of disciplining and reforming the offender, protecting society, and deterring others from similar misconduct. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), citing *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949).

The trial court noted that defendant was "difficult from the beginning" and had an "attitude." While these remarks indicate that the trial court may have held defendant in low esteem, it does not appear that the court's personal feelings affected its sentencing decision. Rather, a review of the record indicates that the trial court sentenced defendant at the top of the guidelines because he felt that defendant was a risk to society. These are permissible considerations when imposing a sentence. *See Snow, supra*.

2. Prior Convictions Without Counsel

Defendant next asserts that he should be resentenced because the trial court improperly considered prior convictions that were obtained without the benefit of counsel. We disagree.

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. Earlier convictions obtained in violation of this right may not be used to enhance a criminal sentence. *United States v Tucker*, 404 US 443, 449; 92 S Ct 589; 30 L Ed 2d 592 (1972). However, "a defendant who collaterally challenges an antecedent conviction allegedly procured in violation of *Gideon [v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963)], bears the initial burden of establishing that the conviction was obtained without counsel or without a proper waiver of counsel." *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). A defendant can satisfy this burden by: (1) presenting proof, such as a docket entry or a transcript, evidencing that a previous conviction was obtained without counsel; or (2) presenting evidence that the sentencing court either failed to reply to a defendant's request for such records or refused to furnish copies within a reasonable time. *Id*.

Defendant cites a portion of the presentence investigation report (PSIR) indicating that his 1980 conviction was obtained without an attorney present. Defendant also points out that the PSIR records the presence of counsel as "unknown" for all three of his 1982 convictions.

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[4] In support of this claim, defendant cites the trial court's remarks at a hearing on a motion for resentencing in connection with a different, plea-based conviction.

Defendant claims that he is unable to prove that he lacked counsel on these occasions because the records for these cases no longer exist. Nevertheless, "while presuming invalidity from a silent or unavailable record may be appropriate on direct review, such a presumption is less compelling in a collateral challenge where the countervailing presumption of regulatory is entitled to greater deference . . . ." *Id*. at 37, citing *Parke v Raley*, 506 US 20, 29; 113 S Ct 517; 121 L Ed 2d 391 (1992).

On this record, we find that defendant failed to carry his initial burden of proof by establishing that his prior convictions were obtained in violation of his right to counsel. Consequently, defendant is not entitled to a *Tucker* hearing. See *Carpentier, supra* at 34-35.

3. Inaccurate Information

Defendant further argues that the trial court relied on erroneous conclusions concerning his criminal history in determining his sentence. We disagree.

A criminal defendant has a due process right to be sentenced on the basis of accurate information. US Const, Am XIV; Const 1963, art 1, § 17; *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990); see also MCL 769.34(10). We review a sentencing court's factual findings for clear error. MCR 2.613(C); *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). However, because defendant failed to object to the trial court's factual representations during sentencing this issue is unpreserved on appeal. MCR 6.429(C); MCL 769.34(10). Our review is thus limited to plain error affecting his substantial rights. *Carines, supra*.

Defendant notes several discrepancies between the PSIR and the trial court's statements during sentencing. However, after carefully reviewing the record, we find no evidence of plain error affecting defendant's substantial rights. *Id*. While the trial court's description of defendant's criminal history was somewhat inaccurate, any error in this regard was insignificant. We further note that defendant was afforded an opportunity to rebut any improper conclusions reached by the trial court concerning his prior arrests and convictions. See *United States v Cesaitis*, 506 F Supp 518, 524-525 (ED Mich, 1981); see also MCL 769.34(10). Nevertheless, we find that defendant's criminal history clearly supports the trial court's ultimate conclusion that defendant posed "a danger to the community." For these reasons, resentencing is not required.

D. Habitual Offender

Defendant also challenges his status as a fourth habitual offender. According to defendant, the prior convictions used to enhance his sentence were never placed on the record. He further claims that his habitual offender notice was deficient because some of the offense dates were inaccurate and there was an erroneous statutory citation.

A review of the record reveals that defendant waived any error concerning the information contained in his habitual offender notice. We note that defendant answered in the affirmative when the trial court asked him if the crimes in the notice were correct. Thus, we find that defendant has effectively waived any challenges to the accuracy of the notice on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). We note that defendant admits

to having at least five prior felonies. This is clearly more than the three felonies required to invoke enhanced sentencing pursuant to MCL 769.12.

E. Effective Assistance of Counsel

Defendant ultimately argues that his trial counsel was ineffective for failing to preserve the sentencing issues that he raises on appeal and for not challenging the habitual offender notice. We disagree. Because defendant failed to raise this issue before the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights. *Carines*, *supra*.

To establish ineffective assistance of counsel, defendant must show that but for his counsel's error the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Because we find no sentencing errors affecting defendant's substantial rights, defendant has failed to meet this burden. We further note that defendant personally waived any error with regard to the habitual offender notice.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly